Local 888, American Federation of Government Employees (Bayley-Seton Hospital) *and* Hector Gunaratne *and* Elsie Pascoe *and* Charles Irizarry. Cases 29–CB–7435, 29–CB–7437, and 29–CB–7490

August 31, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On December 20, 1991, Administrative Law Judge Steven B. Fish issued the attached decision. Thereafter, the Respondent and the General Counsel filed exceptions and supporting briefs as well as answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions,[1] and to adopt the recommended Order as modified.[2]

[1] The judge found that American Federation of Government Employees, AFL–CIO (AFGE) is an alter ego of now-disbanded Local 888 and is liable for Local 888's unfair labor practices. AFGE excepted on the ground that it is not named as a party in this proceeding. On May 21, 1992, the Board issued a show cause notice affording AFGE an opportunity to show why it should not be bound by any remedial order that may issue, and also inviting it to proffer evidence in support of reopening the hearing on the issue of its liability. AFGE's answer to the show cause notice neither establishes any legal basis for modifying the judge's recommended Order nor proffers any evidence to warrant reopening the hearing.

[2] The judge did not include a backpay provision in his recommended Order because he found that the General Counsel had expressly disclaimed any request for backpay. We agree with the General Counsel's exceptions on this issue and find that the failure expressly to request a backpay remedy is not a disclaimer. In any event, we find that backpay is a matter within the Board's remedial authority and is predicated on the merits of the respective grievances. We note in this connection that the Respondent originally determined that the grievances warranted going to arbitration. We shall therefore modify the judge's recommended Order by requiring the Respondent, because of its unlawful refusal to process the grievances, to pay the grievants any backpay that may be owing to them in the event that it is not possible to secure a resolution of the grievances on their merits. See *Rubber Workers Local 250 (Mack-Wayne Closures)*, 279 NLRB 1074 (1986) (*Mack-Wayne I*), and *Rubber Workers Local 250 (Mack-Wayne Closures)*, 290 NLRB 817 (1988) (*Mack-Wayne II*). Backpay shall be computed either in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), or in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), whichever is appropriate in the case of each individual grievant, with interest thereon computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In the absence of a showing of animosity that would preclude the Union from representing the grievants, Member Oviatt would not require the Union to provide outside counsel to represent the grievants. See *General Motors Corp.*, 237 NLRB 1509 fn. 3 (1978).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, American Federation of Government Employees, AFL–CIO, and its Local 888, New Brunswick, New Jersey, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

''(c) In the event that it is not possible to pursue the remaining stages of the grievance procedure, resulting in the inability to resolve the grievances of Hector Gunaratne, Elsie Pascoe, and Charles Irizarry on the merits, make them whole for any loss they may have suffered as a result of its unlawful conduct in failing to process their grievances, by payment to Elsie Pascoe of the amount she would have normally earned if she had not suffered a reduction in hours, and to Hector Gunaratne and Charles Irizarry the amounts they would have normally earned from the date of their discharges until they obtained substantially equivalent employment, less their net earnings during the backpay period, together with interest.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT arbitrarily refuse to process the grievances of any employees represented, or formerly represented, by us because the employees voted to be represented by another labor organization or because the other labor organization becomes certified as the representative of the employees, notwithstanding that the grievances of the employees arose at a time when we were the exclusive collective-bargaining representative of the employees.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL promptly pursue the grievances of Hector Gunaratne, Elsie Pascoe, and Charles Irizarry to arbitration with Bayley-Seton Hospital in good faith with all due diligence.

WE WILL permit Hector Gunaratne, Elsie Pascoe, and Charles Irizarry to be represented by their own

counsel at the arbitration proceedings and pay the reasonable legal fees of such counsel.

WE WILL, in the event that we are unable to pursue the remaining stages of the grievance procedure, resulting in the inability to resolve the grievances of Hector Gunaratne, Elsie Pascoe, and Charles Irizarry on the merits, make them whole for any losses they may have suffered as a result of our unlawful conduct in failing to process their grievances, by payment to Elsie Pascoe of the amount she would have normally earned if she had not suffered a reduction in hours, and to Hector Gunaratne and Charles Irizarry the amounts they would have normally earned from the date of their discharges until they obtained substantially equivalent employment, less their net earnings during the backpay period, together with interest.

LOCAL 88, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL–CIO

Brian Quinn, Esq,. for the General Counsel.
Derrick Thomas, National Representative, of New Brunswick, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges filed in the above-cited cases by Hector Gunaratne, Elsie Pascoe, and Charles Irizarry, the Region issued complaints on December 21,[1] 27, 1989, and January 9, 1990, respectively. All three complaints which essentially alleged identical 8(b)(1)(A) violations against Local 888, American Federal of Government Employees (Respondent); i.e., an arbitrary refusal to process grievances, were subsequently consolidated for hearing by order dated June 13, 1990.

The trial with respect to issues raised therein was heard before me on March 13, 1991, in Brooklyn, New York. A brief has been filed by the General Counsel and has been carefully considered.

Based on the entire record I make the following:

FINDINGS OF FACT[2]

I. JURISDICTION AND LABOR ORGANIZATION

Bayley-Seton Hospital (the Employer) is a New York corporation located in Staten Island, New York, where it is engaged in the operation of a hospital providing health care services and related services. During the past year, the Employer derived gross revenues in excess of $250,000 and purchased and received at its Staten Island, New York facility products, goods, and materials valued in excess of $50,000 directly from points located outside the State of New York. It is admitted and I find that the Employer is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

It is also admitted that Respondent as well as North Shore Health Care Employees Union (North Shore) are, and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

II. FACTS

For many years, Respondent had been the recognized collective-bargaining representative of all nonprofessional employees of the Employer including all management officials, confidential employees, professional employees, guards, and supervisors as defined in the Act. The parties were signatory to a collective-bargaining agreement effective by its terms from September 1, 1986, to August 31, 1989. The agreement contains a grievance procedure, culminating in an arbitration provision for any unresolved disputes between the parties.

In early 1989, Elsie Pascoe, a unit employee complained to Kenneth O'Neil, Respondent's president, about a reduction in her hours. O'Neil thereafter investigated this complaint, and on March 2, filed a grievance with the Employer on behalf of Pascoe as well as three other employees, entitled ''non-voluntary reduction of work hours.''

Subsequently, various steps in the grievance procedure were complied with, which resulted in some employees other than Pascoe, having their hours restored. On May 22 O'Neil filed a demand for arbitration, asserting that the Employer had violated the contract by reducing the normal work hours of unit employees, and requesting that all employees affected be reinstated to their normal hours and be compensated for their loss in pay. Although the grievance refers to ''employees affected'' O'Neil testified that the arbitration demand was made on behalf of Pascoe only. A copy of this arbitration demand was sent to the District Office of American Federation of Government Employees (the National or AFGE) located in New Brunswick, New Jersey.

On May 31, the American Arbitration Association (AAA) sent to the parties a letter confirming the filing of a grievance, along with a list of arbitrators to be selected.

Additionally, on February 9, 1989, O'Neil filed a grievance with the Employer concerning the elimination of positions of certain employees who were out on leave. This grievance was also processed, not successfully resolved, resulting in a demand for arbitration filed by O'Neil as president of Respondent, asserting that the Employer violated the contract by eliminating positions of employees on sick leave. Once again, although the demand does not name any specific employees, O'Neil testified that the demand was filed on behalf of employees Hector Gunaratne and Charles Irizarry.

Subsequently, an arbitrator was selected for this arbitration, which was scheduled to be heard on June 6.[3]

In late May 1989, AFGE placed Respondent under trusteeship. O'Neil and its other officers were removed from their positions. Derrick Thomas, AFGE's National representative

[1] All dates hereinafter are in 1989 unless otherwise indicated.

[2] While every apparent or nonapparent conflict in the evidence may not have been specifically resolved below, my findings are based on my observation of the witnesses' demeanor while testifying and my evaluation of the reliability of their testimony; therefore any testimony in the record which is inconsistent with any findings is hereby discredited.

[3] Both Irizarry and Gunaratne received letters from Respondent dated May 21, informing them of the arbitration, and enclosing a copy of the AAA's notice of hearing. A copy of this letter was sent to Rita Mason, AFGE's vice president.

for the Second District, who had since 1987 been assigned to assist Respondent's officials with various matters concerning the Employer, assumed responsibility as trustee for running the Local. At the time, O'Neil asked Thomas what was going to happen with the pending grievances. Thomas responded that he would handle them.

On the day that Thomas took over, he noticed that most of the files were missing from the Local's office,[4] and there appeared to have been a break in. Thomas asked O'Neil about the files, and O'Neil disclaimed any knowledge of what had happened to them.

Shortly thereafter, Thomas requested a postponement of the previously scheduled June 6 arbitration concerning the elimination of positions. By letter dated June 5, the AAA confirmed such a postponement and stated that the parties should apprise the office of further developments.

Meanwhile, O'Neil after being removed as president of Respondent, formed North Shore and filed a petition with the Region dated June 2 in Case 29–RC–7367 on behalf of North Shore to represent the Employer's employees.

Pursuant thereto, an election was conducted on September resulting in a certification of North Shore as the collective-bargaining representative of the unit previously represented by Respondent, on September 25.

Meanwhile, as noted above, Thomas had asked in June to postpone the arbitration scheduled for June 6, with respect to elimination of positions. Thereafter Thomas made no effort to reschedule the hearing. Thomas testified that he did not have the files, and he needed time to find out what was going on with respect to that grievance.

Pascoe's grievance as noted had not as yet been given an arbitration date, although Respondent had filed for arbitration, and a list of arbitrators had been sent to the parties. Pascoe contacted Thomas in July and August and asked about her grievance. Thomas replied that things were still in disarray, but that he would speak with Flora Doty, the employer's director of human resources about Pascoe's grievance.

Subsequently, Thomas spoke to Doty about Pascoe and was informed that the Employer viewed the cutting of Pascoe's hours to be legal. Thomas notified Pascoe of his call to Doty, and told her that Respondent still intended to pursue her grievance, but that records were still missing. Pascoe became angry and threatened to go to the Labor Board if she did not get action from Respondent. According to Thomas, he did not know that Pascoe's case had been scheduled for arbitration, since he did not have the files.

However, on or about August 1, a bill from the AAA was sent to Respondent requesting payment to the AAA for initial fees regarding the arbitration request concerning the reduction in hours. While this grievance concerned Pascoe, as noted, her name does not appear on the request for arbitration. O'Neil received the invoices, as he apparently was still getting mail addressed to Respondent, although he had been removed as president. O'Neil gave the invoices to Thomas, which reflected that two previous invoices had been sent to Respondent for payment. O'Neil asked Thomas why the invoices was not paid, and Thomas did not respond.

Neither Thomas nor Respondent took any further action on Pascoe's grievance or the arbitration. On August 1, and again on December 6, the AAA sent a letter to the parties requesting information as to the status of the case. Respondent did not reply to the AAA, nor did it notify Pascoe as to the status of her arbitration.

As for the elimination of positions grievance concerning Irizarry and Gunaratne, as noted above, the scheduled arbitration was postponed at the request of Thomas. Respondent, however, did not notify either Gunaratne nor Irizarry that their arbitration had been postponed. Both Gunaratne and Irizarry spoke to Thomas about their grievances, after O'Neil's removal as president. Thomas told them that he would be looking into their grievances but that records were still missing, Respondent's finances were in disarray, and those matters had to be straightened out before it could proceed in a normal fashion. Subsequently, Gunaratne who had retained a copy of his grievance, gave Thomas a manila folder containing matters pertaining to his grievance.

Thomas, after reading the file, met with Doty on behalf of Gunaratne. Doty insisted that the Employee had not violated the contract in its dealings with Gunaratne. According to Thomas, he, after speaking with Doty had some doubt about the validity of Gunaratne's claim, but he asserts that he told Doty that the matter was not settled and would be pursued. Thomas admits that he never told Gunaratne about his conversation with Doty, nor that he had some doubts about Gunaratne's claim. On the day of the election, September 7, Gunaratne asked Thomas what had happened with his grievance. Thomas replied, ''I don't know.''

As for Irizarry, apparently Thomas did not discuss his grievance with Doty. Thomas asserts that he did not have the files, and claims that he asked O'Neil on various occasions if he had copies of the files, and O'Neil claimed that he did not.[5]

In August, Irizarry asked Thomas about his grievance, and added that he was leaning towards voting for AFGE in the pending election. Thomas told Irizarry that it didn't matter who Irizarry intended to be for, but Respondent was going to represent him and see to it that he got a fair dial.

On the day of the election, Irizarry confronted Thomas and told him that Respondent was a lousy union because they never followed up on his grievance. Thomas replied that there was nothing he could do. After the ballots were counted, showing North Shore as the winner of the election, O'Neil approached Thomas and asked about the status of the arbitrations. Thomas replied, ''You won, isn't that enough.''

Thomas also testified that during the period after the trusteeship and prior to the certification, Respondent could not reschedule the arbitration, since then its finances were ''in disarray,'' and there was no money to take cases to arbitration. However, Thomas admits that during the period from June to September 25, Respondent was still receiving dues from the Employer's 475 employees pursuant to the checkoff clause in the contract. Thomas explains, however, that these money were used to pay for past due per capita taxes that Respondent owed to AFGE, and could not be used to pay for arbitrations.

[4] Respondent had an office on the premises of the Employer.

[5] O'Neil also told Thomas that copies of all grievances and papers are sent to AFGE's District Office. Thomas asserts however that he did look in the District's offices, and could not find copies of the grievances.

On or about October 13, O'Neil on behalf of North Shore met with representatives of the Employer. O'Neil mentioned that there were some outstanding grievances and arbitrations scheduled, and wanted to discuss them. The Employer took the position that it would not discuss the prior grievances with North Shore, nor would it recognize or participate in any arbitrations previously scheduled, since they had occurred under the old contract, at a time when the employees were represented by Respondent and not by North Shore.

Thereafter, the instant charges were filed by Gunaratne, Pascoe, and Irizarry on November 6, and 13 and January 9, 1990, respectively.

According to Thomas, after receiving correspondences from the AAA in early November and December concerning the pending arbitrations, he spoke with his National vice president, Rita Mason, about the matter. After checking with AFGE's General Counsel, Mason informed Thomas that since Respondent was no longer the exclusive representative of employees at Bayley-Seton Hospital, with no collective-bargaining agreement in force, it had no legal obligation to pursue the grievances. Additionally, Thomas was instructed to so advise the AAA of the newly certified Union and that future dealings should be with North Shore with respect to these matters.

By this time, Gunaratne's charge had been filed with the Board. Thus, by letter dated December 20, from Thomas to the Region, he expressed Respondent's position with regard to its representation status concerning Gunaratne's case, and as Thomas testified, this position applies to all of the grievances involved herein. The letter asserts that as a result of the election, Respondent ''lost its standing as the exclusive representative for bargaining unit employees at Bayley-Seton Hospital.''

The letter further asserts that all future inquiries concerning the grievance should be made to O'Neil and to North Shore, consistent with Respondent's view that North Shore as the current exclusive representative of the employees, is responsible for the processing of any grievances. A copy of this letter was sent to and received by O'Neil.

Thomas admits that he did not notify any of the three grievants or charging parties of Respondent's position in this regard, or that Respondent had requested that their arbitration hearings be postponed.

III. ANALYSIS

The General Counsel argues that Respondent has arbitrarily refused to process the grievances of the three charging parties, both before and after the representation election and the resultant certification of North Shore as the representative of the unit employees. Prior to the certification, the General Counsel contends that Respondent's representation of the employees was violative of the Act because its misled the grievant about their cases, and failed to adequately inform them of the status of such cases. The General Counsel views such representation as a ''willful failure to pursue the grievances, and therefore perfunctory.'' *Linden Maintenance Corp*., 280 NLRB 995, 996 (1986).

However, I do not deem it necessary to pass upon the General Counsel's position in this regard, since I am convinced that Respondent's postcertification conduct is violative of its duty to represent employees. Since this finding, and the remedy that I shall recommend, adequately remedies the violations found, I do not believe that it is essential to decide whether Respondent's precertification conduct was unlawful.

Turning to Respondent's actions subsequent to the certification of North Shore, it is undisputed that it thereafter refused to continue to process the grievances of the three grievants herein. It is noteworthy and also not in dispute that Respondent had determined during the term of the collective-bargaining agreement that these grievances had merit, and had requested arbitration with respect to both grievances.

The sole reason that Respondent now has refused to continue to process and arbitrate these grievances, is the intervening certification of North Shore, as the collective-bargaining representative of the Employer's employees in the unit. Respondent contends that as a result of this certification, it is no longer the exclusive representative of the employees in the unit, and it no longer has a duty of fair representation towards these employees. It further asserts that North Shore as the collective-bargaining representative, since September 25, has the sole obligation and responsibility to process these grievances. I do not agree, and find Respondent's defense to be unpersuasive.

Federal court cases, citing Supreme Court precedent, have consistently required employees to arbitrate grievances, notwithstanding the fact that the Union has been decertified, *UAW v. Telex Computer Products*, 816 F.2d 519 (10th Cir. 1987); *U.S. Gypsum v. Steelworkers*, 384 F.2d 38 (3d Cir. 1967); *Operating Engineers Local 368 v. Western Electric*, 359 F.Supp. 651, 654 (D.N.J. 1973); or has otherwise lost its majority status. *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

Thus, the obligation to arbitrate grievances survives expiration of the contract, where (as here) the dispute arose during the contract term, the grievance procedure had commenced and arbitration proceedings had not yet begun before termination. *Nolde Bros. v. Bakery Workers*, 430 U.S. 243, 251 (1977); *Auto Workers v. Telex*, supra.

''Decertification does not retroactively obliterate contract rights. Events which may change relations between and among employer, union, and employees may impact but do not destroy the right to redress arising under and relating to a valid preexisting contract.'' *Telex*, supra at 523.

> The duration in time of the substantive rights (under the contract) themselves is not affected by decertification. Decertification cannot ordinarily extinguish substantive rights. . . . This result obviously is called for as to those substantive rights which arose under the contract and ripen into some relief which becomes operative prior to decertification. Such grievances are ones which arose under a contract and for breach of which effective relief was available prior to decertification. With respect to grievances, relief for which is operative up to the time of decertification the Union clearly has the right to assert them. [*U.S. Gypsum*, supra at 45, 46.]

See also footnote 5 of the Supreme Court's *Wiley* decision, where it held that ''the fact that the Union does not represent a majority of an appropriate unit in *Wiley* does not prevent it from representing those employees who are covered by the agreement which is in dispute and out of which Wiley's duty to arbitrate arose.'' 376 U.S. at 545.

While the above authority dealt with Section 301 proceedings to compel arbitration, the Board has taken a similar view of the obligation of an employer to arbitrate grievances subsequent to the expiration of a collective-bargaining agreement. In *Indiana & Michigan Electric Co*., 284 NLRB 53 (1987), the Board applied the analysis of *Nolde*, supra, to 8(a)(5) cases involving such refusals to arbitrate postcontract grievances. Thus, arbitration will be compelled when the parties' agreement does not expressly or by implication negate the presumption that the contractual obligation to arbitrate grievances arising under the contact extends to postexpiration disputes. Id. at 59. See also *Uppco Co*., 288 NLRB 937, 938 (1988). The grievance procedure and arbitration clauses in the expired contract herein are broad, and contain no language which will negate the presumption of survivability, particularly where as here the acts complained of, as well as the initial grievances were filed during the term of the agreement.[6]

Thus, under *Indiana & Michigan*, supra, the Employer would be obligated to arbitrate these grievances. I do not believe that the subsequent decertification of Respondent, relieves the Employer of that obligation. In *Missouri Portland Cement*, 291 NLRB 1043 (1988), the Board was confronted with an employer's refusal to continue to process a grievance with a union, because it had lawfully closed its facility, terminated employees, and reopened with a new work force. Therefore, since the bargaining unit no longer existed, and the union was no longer the exclusive representative of its employees, the employer argued that it no longer was obligated to deal with the union concerning grievances. The Board disagreed, concluding that since these grievances were pending at the time of the dissolution of the unit, the union continued to represent the former unit employees with respect to these grievances, notwithstanding the union's loss of status, as exclusive representative of the employer's employees.

Subsequent to *Missouri Portland*, supra, the Board considered specifically the question of the effect of a new collective-bargaining representative upon the duty to arbitrate under *Indiana & Michigan* principles. In *Arizona Portland Cement Co*., 302 NLRB 30 (1991), the newly certified union sought to compel arbitration of grievances which the employer had agreed to arbitrate with the prior representative. The Board did not find the employer therein had consented to arbitrate the grievances with the newly certified union, since the agreement to arbitrate under the expired contract was with the previous union representative. The Board cited *Missouri Portland*, supra, as holding that an employer is obligated to ''*complete unfinished business, so to speak*,'' (emphasis supplied), by meeting with the former representative of the employees over grievances that had arisen at a time when the employer still had an obligation to recognize that representative. The Board observed significantly that the previous representative, unlike in the instant case, had not filed charges in that case. Thus, it appears that had the previous representative filed charges, as here, the Board would have followed *Missouri Portland*, supra; *Wiley*, supra; and *Telex*, supra, and ordered the employer therein to arbitrate the grievances to which it had previously agreed, with the prior representative.

Thus, I conclude that the Employer in the instant matter would be obligated to ''complete unfinished business,'' *Missouri Portland*, supra, and arbitrate the grievances with Respondent to which it had agreed, and which had arisen at the time their contract was in force.

I would also note that *Arizona Portland*, supra, as well as *Telex*, supra, cautioned against potential problems of having two representatives simultaneously representing the same employees. However, I do not believe that these concerns are warranted in the present situation. Thus, I see no potential conflict since North Shore and its president, O'Neil (also Respondent's former president), are fully supportive of the employees' grievances, and in fact have attempted, albeit unsuccessfully to discuss these matters with the Employer and to force the Employer to arbitrate the grievances with North Shore. Since the Employer is not obligated to arbitrate the grievances with North Shore, *Arizona Portland*, supra, and is at present refusing even to discuss these matters with North Shore, it is not likely that having to arbitrate the grievances with Respondent would produce a conflict in representation or be destructive of industrial peace. Indeed, it is conceivable that either the grievant, Respondent, or perhaps even both would decide to utilize the assistance of O'Neil in connection with the arbitrations, since O'Neil as Respondent's former president filed the underlying grievances and is presumably most familiar with the facts concerning such grievances.

Having concluded that the Employer is obligated to arbitrate these grievances with Respondent, the next question is whether Respondent is therefore obligated to continue to pursue them. I believe that the answer must be in the affirmative. Thus, since Respondent has the right to continue to process these grievances through the arbitration stages, it follows that it has also the duty to continue to do so, and that the decertification of Respondent is not a defense to its failure to do so. See *U.S. Gypsum*, supra, where the court of appeals opinion repeatedly equated the right of the Union to pursue claims of employees with its corresponding duty to do so under the duty of fair representation. See id. at 45 and 46.

Indeed as in *Telex*, supra, and discussed by the court, the contract provides for rights which run directly to Respondent, such as payment of dues through checkoff. I am confident that had the Employer checked off dues and failed to remit same to Respondent, in violation of the contract, Respondent would have no hesitation in seeking arbitration of this breach, notwithstanding its subsequent replacement as collective-bargaining representative. I see no valid reason why Respondent should be able to refuse to process a grievance to arbitration, for the benefit of employees, where it initially agreed to do so and in fact started the process, merely because it no longer represents the employees for future bargaining. This is the critical distinction which Respondent overlooks. The matters in dispute here involve grievances which were in existence and in fact had already been in the arbitration process, at the time the contract was in force and Respondent was still the exclusive representative of the employees. See *Arizona Portland*, supra at fn. 5. Thus, in my view, Respondent is obligated to ''complete unfinished busi-

[6] I would also note that arbitration of both grievances was requested by the Respondent and an arbitration scheduled on one of the grievances, also during the contract's term.

ness,'' *Arizona Portland*, supra at 30, and to continue to arbitrate the claims of the grievant herein.

By failing to do so, solely[7] because it had been replaced as collective-bargaining representative, Respondent has acted arbitrarily and violated Section 8(b)(1)(A) of the Act. I so find.

CONCLUSIONS OF LAW

1. Respondent, Local 888, American Federation of Government Employees, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. Bayley-Seton Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

3. Since on or about September 25, 1989, Respondent has arbitrarily failed to process the grievances of Hector Gunaratne, Elsie Pascoe, and Charles Irizarry, because these employees and other employees in the unit had voted to be represented by another labor organization and because said other labor organization had been certified as the collective-bargaining representative of the employees in the unit, notwithstanding that the grievances of these employees arose during and under the terms of a collective-bargaining agreement between Respondent and the Employer, at a time when Respondent was the exclusive representative of said employees.

4. These violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(b)(1)(A) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the purposes and policies of the Act.

The General Counsel has expressly disclaimed any request for payment of backpay to the employees by Respondent, but has requested that Respondent be ordered to pay legal fees to independent counsel to represent the employees in an arbitration proceeding. *Teamsters Local 186 (United Parcel Service)*, 203 NLRB 799 (1973), enfd. in part and remanded in part 509 F.2d 1075 (9th Cir. 1975), clarified on remand 220 NLRB 35 (1975).

I agree with the General Counsel that such an order is appropriate in the circumstances herein. In view of the fact that Respondent is no longer the collective-bargaining representative of the employees in the unit, I find it questionable whether it will pursue the arbitration with sufficient vigor, even when ordered to do so by the Board. Therefore, in agreement with the General Counsel, I shall recommend that Respondent be ordered to permit the grievant to be represented at the arbitration by their own counsel and that Respondent pay the reasonable attorney's fees of such counsel. *Linden Maintenance*, supra at 997; *United Parcel Service*, supra; *Glass Blowers Local 106 (Owens-Illinois, Inc.)*, 240 NLRB 324, 325 (1979).

A second remedial problem involves the current status of Respondent. According to Thomas, Respondent is now disbanded. Since Respondent's only shop was the Employer, after the certification, Thomas asserts that AFGE removed the Local from the National, cancelled the insurance bond, and notified the IRS and the Department of Labor that the Local was no longer in AFGE. Moreover, all money in the Local's account were transferred to the National. Respondent also had an office on the Hospital's grounds. The record does not establish what happened to that office.

The General Counsel contends that the AFGE should be ordered to comply with the Order herein, should the above facts render Respondent unable to do so. I agree.

The record reveals that AFGE placed Respondent under trusteeship in May 1989, and in effect was in charge of operating the Union through Thomas, its National representative, during the time that the unfair labor practices found herein were committed. Thus, in my view, AFGE was an alter ego of Respondent since late May 1989, and is responsible for remedying the unfair labor practices committed by Respondent. Moreover, I would note that the decision not to pursue the arbitration claims of the grievant herein, because of the certification of North Shore, was in fact made by AFGE through Rita Mason, AFGE's vice president. In these circumstances, it is appropriate to impose liability on AFGE to remedy the violations found herein. *Plumbers Local 589 (L & S Plumbing)*, 294 NLRB 616 (1989).

Additionally, since it appears that Respondent probably does not have a local office any longer, I shall recommend that it post the appropriate notices at AFGE's District Office in New Brunswick, New Jersey. It is not necessary to order mailing of the notices to the employees employed by the Employer, since these employees will be adequately apprised of the notice by the provisions requiring Respondent to sign and mail copies of the notice to the director for posting at the Employer's premises, if the Employer is willing. However, if the Employer is not willing to post the notice, then it would be appropriate to order Respondent to sign and mail copies of the notice to all members of the bargaining unit employed by the Employer.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, American Federation of Government Employees, and its Local 888, their offices, agents, and representatives, shall

1. Cease and desist from

(a) Arbitrarily refusing to process the grievances of any employees represented by it, or formerly represented by it, because the employees voted to be represented by another labor organization or because the other labor organization becomes certified as the representatives of such employees, notwithstanding that the grievances of the employees arose at

[7] I note that Respondent has made no assertion that it failed to pursue these claims because of any doubts about the merits of any of the grievances. Indeed, as noted, Respondent had originally determined that the grievances warranted going to arbitration, and had in fact requested that both grievances be heard by an arbitrator.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

a time when it was the exclusive collective-bargaining representative of the employees.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Promptly pursue the grievances of Hector Gunaratne, Elsie Pascoe, and Charles Irizarry to arbitration in good faith with all due diligence.

(b) Permit Gunaratne, Pascoe, and Irizarry to be represented by their own counsel at the arbitration proceedings and pay the reasonable legal fees of such counsel.

(c) Post at AFGE's District Office in New Brunswick, New Jersey, and at all other places where notices to members are customarily posted, copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by Respondent and AFGE's authorized representatives, shall be posted by AFGE immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by AFGE to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and mail to the Regional Director copies of the aforementioned notice for posting at the premises of Bayley-Seton Hospital (the Employer) if the Employer is willing. If it is determined at the compliance stage of this proceeding that the Employer is not willing to post, AFGE and Respondent shall sign and mail copies to all employees of the Employer in the bargaining unit formerly represented by Respondent.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent and AFGE have taken to comply.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''